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Supreme Court, U.S.
FILED
AUG 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-64 (3)

In The

Supreme Court of the United States

October Term, 1985

WORLD OF SLEEP, INC.
Cross Petitioner

v.

LA-Z-BOY CHAIR COMPANY;
MONTGOMERY WARD & CO., INC.; and
ARTHUR MAULDIN, individually and
d/b/a LA-Z-BOY SHOWCASE SHOPPE
Cross Respondents

BRIEF OF LA-Z-BOY CHAIR COMPANY IN OPPOSITION TO CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

As to cross respondent La-Z-Boy Chair Company, only cross petitioner's question number 4 is relevant:

> Whether the evidence supported the jury verdict in favor of World of Sleep based on an unlawful price discrimination under the Robinson-Patman Act.

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BRIEF OF LA-Z-BOY CHAIR COMPANY IN OPPOSITION TO CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

A detailed statement of the case is set forth in cross respondent's petition for a writ of certiorari, No. 84-1893, and is incorporated by reference herein.

With respect to World of Sleep's Robinson-Patman claim, the proofs showed that La-Z-Boy originally sold one line of action chairs, the Charter line, to furniture stores. In the late 1960's La-Z-Boy developed the more exclusive Americana line to sell to chain and department stores which had not previously carried La-Z-Boy products (R. XIV, 2414). La-Z-Boy promoted the Charter line extensively through national and local advertising programs (R. XV, 2559). Because chain and department stores preferred to do their own local advertising, La-Z-Boy established a promotional allowance for each Americana chair purchased provided the dealer proved that it actually spent the money on promotion. This allowance, originally $2.25 per chair, then $3.00 per chair, then dropped in 1979, was set at a rate which approximated the per chair advertising expenditures made directly by La-Z-Boy on the Charter line (R. XV, 2526, 2697; R. XII, 1970). Montgomery Ward purchased the Americana line and received the promotional allowance. World of Sleep's president, Thomas Hansen, was aware of the distinction between the two lines from his prior experience and chose the more established Charter line when he began carrying La-Z-Boy in Denver in 1974 (R. IV, 558-63). World of Sleep thus received only promotional aids during the approximately three years as a La-Z-Boy dealer.

In its complaint, World of Sleep alleged that La-Z-Boy's provision of an advertising allowance on only one line of chairs violated Section 2(e) of the Robinson-Patman Act, 15 USC §13(e). The only evidence of injury from this alleged

discrimination offered by World of Sleep, however, was the testimony of Melinda Harper. Ms. Harper multiplied the advertising allowance by the number of La-Z-Boy chairs actually purchased by World of Sleep and projected hypothetical purchases after World of Sleep ceased ordering from La-Z-Boy (R. XII, 1966-68). In his closing argument to the jury, World of Sleep's counsel similarly argued that the $3.00 per chair advertising allowance was "a matter of reduced cost for every chair that World of Sleep would have sold and could have sold in the market were they permitted to stay there," and that the jury should simply "take that $3.00 and simply multiply it by the number of chairs that World of Sleep did not sell during the time they were entitled to that, and I think the figure is $10,749, . . . you simply have to multiply the number of chairs sold times the $3.00." (R. XVII, 3034, 3038). This was the only theory on which World of Sleep submitted a Robinson-Patman claim for damages to the jury.

The jury returned a verdict of $40,000 for World of Sleep on its Robinson-Patman claim, apparently awarding World of Sleep the amount claimed as lost automatic damages on actual purchases, together with automatic damages for some, but not all, of the prospective purchases claimed after 1976.

On appeal, the Tenth Circuit, applying this Court's rationale in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981), reversed the award of damages under the Robinson-Patman Act. The court found the record devoid of evidence of actual injury required for recovery of damages under Section 4 of the Clayton Act, 15 U.S.C. §15:

> Under the Supreme Court's analysis [in *J. Truett Payne*], a plaintiff must show more than that he failed to receive a promotion allowance. He must show that this disadvantage adversely affected his ability to compete with favored competitors, because this is the competitive injury the Robinson-Patman Act was intended to prevent. . . .

> . . . World of Sleep presented no evidence that the allowance enabled favored competitors to lower their prices and divert sales, or that it had to lower its prices to an unprofitable level in response to such low prices. There is no evidence that the higher price World of Sleep paid for La-Z-Boy chairs had any other adverse impact on its activity in the marketplace. . . .
>
> . . . In view of the complete absence of record evidence that the alleged Robinson-Patman discrimination had any detrimental effect on World of Sleep's ability to do business, its damage claim for this violation should not have gone to the jury.

25a-27a, 756 F.2d at 1480.

REASONS THE PETITION SHOULD BE DENIED

As set forth in its statement of questions presented, the portion of World of Sleep's cross petition dealing with its Robinson-Patman Act claim simply requests this Court to review the record to determine whether there was sufficient evidence to support the jury's verdict. This issue is not claimed to involve either an important question of federal law or a conflict in the decisions of the Circuit Courts of Appeal. Quite the contrary is true. As the Court of Appeals properly held, World of Sleep submitted its Robinson-Patman claim to jury solely on the "automatic damages" theory squarely rejected by this Court in *J. Truett Payne*, a decision incredibly not even cited by World of Sleep in its cross petition. The Circuits have had no difficulty in uniformly applying the logical rationale of *J. Truett Payne*, and World of Sleep has presented no reason for this Court to revisit that recent decision.

ARGUMENT

In *J. Truett Payne*, this Court rejected a claim identical to that advanced by World of Sleep in the district court:

> Petitioner first contends that once it has proved a price discrimination in violation of Section 2(a) it is entitled at a minimum to so-called "automatic damages" in the amount of the price discrimination. . . . It insists . . . that the jury should be permitted to infer the requisite injury and damage from a showing of a substantial price discrimination. . . . We disagree.

451 U.S. at 561 (footnote omitted). This Court based its conclusion upon the reasoning of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and held that "proof of a violation does not mean that a disfavored purchaser has been actually 'injured' within the meaning of Section 4" of the Clayton Act, 15 U.S.C. §15. 451 U.S. at 562. This Court has recently reiterated the *J. Truett Payne* rule requiring some showing of actual injury rather than "automatic damages." *Falls City Industries* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 435-36 nn. 5, 6 (1983).

Before the district court, World of Sleep claimed only that impact on its business from the different advertising allowances was self-evident. The Court of Appeals properly rejected this as the "automatic damages" theory invalidated by this Court in *J. Truett Payne*.

The decision of the Court of Appeals was entirely consistent with those of other courts following *J. Truett Payne*. On remand in *J. Truett Payne*, the Fifth Circuit held that the evidence of actual injury in that case was insufficient to support a damage award even based on the somewhat relaxed rules which apply once the plaintiff has shown the fact of damage:

> Price difference without more does not indicate the amount of lost sales or profits. Self-serving and unsupported assumptions cannot sustain a calculation of going

> concern value. The burden of putting forth substantial evidence is not satisfied by mere speculation and guesswork.

Chrysler Credit Corp. v. *J. Truett Payne Co.*, 670 F.2d 575, 582 (5th Cir. 1982).

The same result was reached on facts similar to the present case in *Interstate Cigar Co.* v. *Sterling Drug, Inc.*, 655 F.2d 29 (2d Cir. 1981). In *Interstate Cigar* the defendant allegedly violated Sections 2(a) and 2(e) of the Robinson-Patman Act by offering a 25% discount to new distributors who had never before handled its products and by allowing distributors other than the plaintiff to take advantage of certain return allowances. The district court dismissed the claims and the Court of Appeals affirmed in the following language:

> Secondly, plaintiffs failed to introduce substantial evidence showing that they were actually injured by defendants' new distributor discount policy. Plaintiffs' theory, that they were entitled to "automatic damages," has been rejected by the Supreme Court, which requires a plaintiff to make a showing of actual injury attributable to a violation of the Robinson-Patman Act.

655 F.2d at 31.

Similarly, in *Allen Pen Co.* v. *Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981), court rejected the automatic damage claim and held that the evidence was insufficient to support a jury verdict on the basis of actual injury resulting from the alleged discrimination. The court stated:

> Our search of the record, however, reveals no evidence that specifically shows or even tends to show that any competitor drew either profits or sales away from Allen Pen. . . . And, the evidence of price difference, for the reasons previously mentioned, is not by itself sufficiently strong to warrant an inference of actual injury. In fact,

> none of the damage theories that Allen Pen proposed to the district court referred to the business activity of a competitor.

653 F.2d at 22 (citations omitted).

In *Olympia Co.* v. *Celotex Corp.*, 597 F.Supp. 285 (E.D. La. 1984), Olympia based its damage claim on an average differential of 5% between the prices it and its competitor paid for Celotex's roofing materials. The court rejected this approach noting that "damages must be proven rather than presumed on the basis of price differential. . . ." 597 F. Supp. at 298, citing *J. Truett Payne*.

In its present cross petition, World of Sleep belatedly attempts to cure the defects in its proofs by arguing that had it received the advertising allowance, it could have (1) lowered its prices, (2) advertised more in an effort to capture more business, or (3) pocketed the allowance as extra profit. Cross petition at 29. The problem with this argument is that there is nothing in the record, and World of Sleep points to nothing, indicating that it had any intention to exercise either the first or second of these options. Nor is there any evidence or even conjecture concerning the effect had it done so. World of Sleep has never argued that its advertising expenditures were inadequate or that its prices were too high to allow it to compete effectively with Montgomery Ward or Mauldin. Indeed, what little evidence there was tended to show that World of Sleep's prices were below those of Wards and Mauldin and its advertising more extensive. As the Court of Appeals noted, World of Sleep attributed its difficulties with La-Z-Boy chairs solely to its inability to obtain adequate supplies of chairs. The third option, pocketing the allowance as extra profit, is the only one which was the subject of any evidence or argument at trial; it is the discredited "automatic damages" theory in its clearest form.

CONCLUSION

In Part IV of its cross petition, unlike La-Z-Boy's petition for a writ of certiorari, World of Sleep has identified neither an important question of federal law nor a conflict in the decisions of the Circuit Courts of Appeal. For this and all of the foregoing reasons, World of Sleep's cross petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: August 20, 1985